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REPORT
105–802

INTERNATIONAL ANTI-BRIBERY AND FAIR COMPETITION ACT OF 1998

OCTOBER 8, 1998.—Committed to the Committee of the Whole House on the State of the Union and ordered to be printed

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Mr. BLILEY, from the Committee on Commerce, submitted the following

R E P O R T

[To accompany H.R. 4353]

[Including cost estimate of the Congressional Budget Office]

The Committee on Commerce, to whom was referred the bill (H.R. 4353) to amend the Securities Exchange Act of 1934 and the Foreign Corrupt Practices Act of 1977 to improve the competitiveness of American business and promote foreign commerce, and for other purposes, having considered the same, report favorably thereon with an amendment and recommend that the bill as amended do pass.

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69–006

AMENDMENT

The amendment is as follows:

Strike out all after the enacting clause and insert in lieu thereof the following:

SECTION 1. SHORT TITLE.

This Act may be cited as the "International Anti-Bribery and Fair Competition Act of 1998".

SEC. 2. AMENDMENTS TO THE FOREIGN CORRUPT PRACTICES ACT GOVERNING ISSUERS.

(a) PROHIBITED CONDUCT.—Section 30A(a) of the Securities Exchange Act of 1934 (15 U.S.C. 78dd–1(a)) is amended—

(1) by amending subparagraph (A) of paragraph (1) to read as follows:

"(A)(i) influencing any act or decision of such foreign official in his official capacity, (ii) inducing such foreign official to do or omit to do any act in violation of the lawful duty of such official, or (iii) securing any improper advantage; or";

(2) by amending subparagraph (A) of paragraph (2) to read as follows:

"(A)(i) influencing any act or decision of such party, official, or candidate in its or his official capacity, (ii) inducing such party, official, or candidate to do or omit to do an act in violation of the lawful duty of such party, official, or candidate, or (iii) securing any improper advantage; or"; and

(3) by amending subparagraph (A) of paragraph (3) to read as follows:

"(A)(i) influencing any act or decision of such foreign official, political party, party official, or candidate in his or its official capacity, (ii) inducing such foreign official, political party, party official, or candidate to do or omit to do any act in violation of the lawful duty of such foreign official, political party, party official, or candidate, or (iii) securing any improper advantage; or".

(b) OFFICIALS OF INTERNATIONAL ORGANIZATIONS.—Paragraph (1) of section 30A(f) of the Securities Exchange Act of 1934 (15 U.S.C. 78dd–1(f)(1)) is amended to read as follows:

"(1)(A) The term 'foreign official' means any officer or employee of a foreign government or any department, agency, or instrumentality thereof, or of a public international organization, or any person acting in an official capacity for or on behalf of any such government or department, agency, or instrumentality, or for or on behalf of any such public international organization.

"(B) For purposes of subparagraph (A), the term 'public international organization' means—

"(i) an organization that is designated by Executive order pursuant to section 1 of the International Organizations Immunities Act (22 U.S.C. 288); or

"(ii) any other international organization that is designated by the President by Executive order for the purposes of this section, effective as of the date of publication of such order in the Federal Register.".

(c) ALTERNATIVE JURISDICTION OVER ACTS OUTSIDE THE UNITED STATES.—Section 30A of the Securities Exchange Act of 1934 (15 U.S.C. 78dd–1) is amended—

(1) by adding at the end the following:

"(g) ALTERNATIVE JURISDICTION.—

"(1) It shall also be unlawful for any issuer organized under the laws of the United States, or a State, territory, possession, or commonwealth of the United States or a political subdivision thereof and which has a class of securities registered pursuant to section 12 of this title or which is required to file reports under section 15(d) of this title, or for any United States person that is an officer, director, employee, or agent of such issuer or a stockholder thereof acting on behalf of such issuer, to corruptly do any act outside the United States in furtherance of an offer, payment, promise to pay, or authorization of the payment of any money, or offer, gift, promise to give, or authorization of the giving of anything of value to any of the persons or entities set forth in paragraphs (1), (2), and (3) of subsection (a) of this section for the purposes set forth therein, irrespective of whether such issuer or such officer, director, employee, agent, or stockholder makes use of the mails or any means or instrumentality of interstate commerce in furtherance of such offer, gift, payment, promise, or authorization.

"(2) As used in this subsection, the term 'United States person' means a national of the United States (as defined in section 101 of the Immigration and Nationality Act (8 U.S.C. 1101)) or any corporation, partnership, association,

joint-stock company, business trust, unincorporated organization, or sole proprietorship organized under the laws of the United States or any State, territory, possession, or commonwealth of the United States, or any political subdivision thereof.";

(2) in subsection (b), by striking "Subsection (a)" and inserting "Subsections (a) and (g)"; and

(3) in subsection (c), by striking "subsection (a)" and inserting "subsection (a) or (g)".

(d) PENALTIES.—Section 32(c) of the Securities Exchange Act of 1934 (15 U.S.C. 78ff(c)) is amended—

(1) in paragraph (1)(A), by striking "section 30A(a)" and inserting "subsection (a) or (g) of section 30A";

(2) in paragraph (1)(B), by striking "section 30A(a)" and inserting "subsection (a) or (g) of section 30A"; and

(3) by amending paragraph (2) to read as follows:

"(2)(A) Any officer, director, employee, or agent of an issuer, or stockholder acting on behalf of such issuer, who willfully violates subsection (a) or (g) of section 30A of this title shall be fined not more than $100,000, or imprisoned not more than 5 years, or both.

"(B) Any officer, director, employee, or agent of an issuer, or stockholder acting on behalf of such issuer, who violates subsection (a) or (g) of section 30A of this title shall be subject to a civil penalty of not more than $10,000 imposed in an action brought by the Commission.".

SEC. 3. AMENDMENTS TO THE FOREIGN CORRUPT PRACTICES ACT GOVERNING DOMESTIC CONCERNS.

(a) PROHIBITED CONDUCT.—Section 104(a) of the Foreign Corrupt Practices Act of 1977 (15 U.S.C. 78dd–2(a)) is amended—

(1) by amending subparagraph (A) of paragraph (1) to read as follows:

"(A)(i) influencing any act or decision of such foreign official in his official capacity, (ii) inducing such foreign official to do or omit to do any act in violation of the lawful duty of such official, or (iii) securing any improper advantage; or";

(2) by amending subparagraph (A) of paragraph (2) to read as follows:

"(A)(i) influencing any act or decision of such party, official, or candidate in its or his official capacity, (ii) inducing such party, official, or candidate to do or omit to do an act in violation of the lawful duty of such party, official, or candidate, or (iii) securing any improper advantage; or"; and

(3) by amending subparagraph (A) of paragraph (3) to read as follows:

"(A)(i) influencing any act or decision of such foreign official, political party, party official, or candidate in his or its official capacity, (ii) inducing such foreign official, political party, party official, or candidate to do or omit to do any act in violation of the lawful duty of such foreign official, political party, party official, or candidate, or (iii) securing any improper advantage; or".

(b) PENALTIES.—Section 104(g) of the Foreign Corrupt Practices Act of 1977 (15 U.S.C. 78dd–2(g)) is amended—

(1) by amending subsection (g)(1) to read as follows:

"(g)(1)(A) PENALTIES.—Any domestic concern that is not a natural person and that violates subsection (a) or (i) of this section shall be fined not more than $2,000,000.

"(B) Any domestic concern that is not a natural person and that violates subsection (a) or (i) of this section shall be subject to a civil penalty of not more than $10,000 imposed in an action brought by the Attorney General."; and

(2) by amending paragraph (2) to read as follows:

"(2)(A) Any natural person that is an officer, director, employee, or agent of a domestic concern, or stockholder acting on behalf of such domestic concern, who willfully violates subsection (a) or (i) of this section shall be fined not more than $100,000 or imprisoned not more than 5 years, or both.

"(B) Any natural person that is an officer, director, employee, or agent of a domestic concern, or stockholder acting on behalf of such domestic concern, who violates subsection (a) or (i) of this section shall be subject to a civil penalty of not more than $10,000 imposed in an action brought by the Attorney General.".

(c) OFFICIALS OF INTERNATIONAL ORGANIZATIONS.—Paragraph (2) of section 104(h) of the Foreign Corrupt Practices Act of 1977 (15 U.S.C. 78dd–2(h)) is amended to read as follows:

"(2)(A) The term 'foreign official' means any officer or employee of a foreign government or any department, agency, or instrumentality thereof, or of a public international organization, or any person acting in an official capacity for or

on behalf of any such government or department, agency, or instrumentality, or for or on behalf of any such public international organization.

"(B) For purposes of subparagraph (A), the term 'public international organization' means—

"(i) an organization that is designated by Executive order pursuant to section 1 of the International Organizations Immunities Act (22 U.S.C. 288); or

"(ii) any other international organization that is designated by the President by Executive order for the purposes of this section, effective as of the date of publication of such order in the Federal Register.".

(d) ALTERNATIVE JURISDICTION OVER ACTS OUTSIDE THE UNITED STATES.—Section 104 of the Foreign Corrupt Practices Act of 1977 (15 U.S.C. 78dd–2) is further amended—

(1) by adding at the end the following:

"(i) ALTERNATIVE JURISDICTION.—

"(1) It shall also be unlawful for any United States person to corruptly do any act outside the United States in furtherance of an offer, payment, promise to pay, or authorization of the payment of any money, or offer, gift, promise to give, or authorization of the giving of anything of value to any of the persons or entities set forth in paragraphs (1), (2), and (3) of subsection (a), for the purposes set forth therein, irrespective of whether such United States person makes use of the mails or any means or instrumentality of interstate commerce in furtherance of such offer, gift, payment, promise, or authorization.

"(2) As used in this subsection, the term 'United States person' means a national of the United States (as defined in section 101 of the Immigration and Nationality Act (8 U.S.C. 1101)) or any corporation, partnership, association, joint-stock company, business trust, unincorporated organization, or sole proprietorship organized under the laws of the United States or any State, territory, possession, or commonwealth of the United States, or any political subdivision thereof.";

(2) in subsection (b), by striking "Subsection (a)" and inserting "Subsections (a) and (i)";

(3) in subsection (c), by striking "subsection (a)" and inserting "subsection (a) or (i)"; and

(4) in subsection (d)(1), by striking "subsection (a)" and inserting "subsection (a) or (i)".

(e) TECHNICAL AMENDMENT.—Section 104(h)(4)(A) of the Foreign Corrupt Practices Act of 1977 (15 U.S.C. 78dd–2(h)(4)(A)) is amended by striking "For purposes of paragraph (1), the" and inserting "The".

SEC. 4. AMENDMENTS TO THE FOREIGN CORRUPT PRACTICES ACT GOVERNING OTHER PERSONS.

Title I of the Foreign Corrupt Practices Act of 1977 is amended by inserting after section 104 (15 U.S.C. 78dd–2) the following new section:

"SEC. 104A. PROHIBITED FOREIGN TRADE PRACTICES BY PERSONS OTHER THAN ISSUERS OR DOMESTIC CONCERNS.

"(a) PROHIBITION.—It shall be unlawful for any person other than an issuer that is subject to section 30A of the Securities Exchange Act of 1934 or a domestic concern (as defined in section 104 of this Act), or for any officer, director, employee, or agent of such person or any stockholder thereof acting on behalf of such person, while in the territory of the United States, corruptly to make use of the mails or any means or instrumentality of interstate commerce or to do any other act in furtherance of an offer, payment, promise to pay, or authorization of the payment of any money, or offer, gift, promise to give, or authorization of the giving of anything of value to—

"(1) any foreign official for purposes of—

"(A)(i) influencing any act or decision of such foreign official in his official capacity, (ii) inducing such foreign official to do or omit to do any act in violation of the lawful duty of such official, or (iii) securing any improper advantage; or

"(B) inducing such foreign official to use his influence with a foreign government or instrumentality thereof to affect or influence any act or decision of such government or instrumentality,

in order to assist such person in obtaining or retaining business for or with, or directing business to, any person;

"(2) any foreign political party or official thereof or any candidate for foreign political office for purposes of—

"(A)(i) influencing any act or decision of such party, official, or candidate in its or his official capacity, (ii) inducing such party, official, or candidate to do or omit to do an act in violation of the lawful duty of such party, official, or candidate, or (iii) securing any improper advantage; or

"(B) inducing such party, official, or candidate to use its or his influence with a foreign government or instrumentality thereof to affect or influence any act or decision of such government or instrumentality,

in order to assist such person in obtaining or retaining business for or with, or directing business to, any person; or

"(3) any person, while knowing that all or a portion of such money or thing of value will be offered, given, or promised, directly or indirectly, to any foreign official, to any foreign political party or official thereof, or to any candidate for foreign political office, for purposes of—

"(A)(i) influencing any act or decision of such foreign official, political party, party official, or candidate in his or its official capacity, (ii) inducing such foreign official, political party, party official, or candidate to do or omit to do any act in violation of the lawful duty of such foreign official, political party, party official, or candidate, or (iii) securing any improper advantage; or

"(B) inducing such foreign official, political party, party official, or candidate to use his or its influence with a foreign government or instrumentality thereof to affect or influence any act or decision of such government or instrumentality,

in order to assist such person in obtaining or retaining business for or with, or directing business to, any person.

"(b) EXCEPTION FOR ROUTINE GOVERNMENTAL ACTION.—Subsection (a) of this section shall not apply to any facilitating or expediting payment to a foreign official, political party, or party official the purpose of which is to expedite or to secure the performance of a routine governmental action by a foreign official, political party, or party official.

"(c) AFFIRMATIVE DEFENSES.—It shall be an affirmative defense to actions under subsection (a) of this section that—

"(1) the payment, gift, offer, or promise of anything of value that was made, was lawful under the written laws and regulations of the foreign official's, political party's, party official's, or candidate's country; or

"(2) the payment, gift, offer, or promise of anything of value that was made, was a reasonable and bona fide expenditure, such as travel and lodging expenses, incurred by or on behalf of a foreign official, party, party official, or candidate and was directly related to—

"(A) the promotion, demonstration, or explanation of products or services; or

"(B) the execution or performance of a contract with a foreign government or agency thereof.

"(d) INJUNCTIVE RELIEF.—

"(1) When it appears to the Attorney General that any person to which this section applies, or officer, director, employee, agent, or stockholder thereof, is engaged, or about to engage, in any act or practice constituting a violation of subsection (a) of this section, the Attorney General may, in his discretion, bring a civil action in an appropriate district court of the United States to enjoin such act or practice, and upon a proper showing, a permanent injunction or a temporary restraining order shall be granted without bond.

"(2) For the purpose of any civil investigation which, in the opinion of the Attorney General, is necessary and proper to enforce this section, the Attorney General or his designee are empowered to administer oaths and affirmations, subpoena witnesses, take evidence, and require the production of any books, papers, or other documents which the Attorney General deems relevant or material to such investigation. The attendance of witnesses and the production of documentary evidence may be required from any place in the United States, or any territory, possession, or commonwealth of the United States, at any designated place of hearing.

"(3) In case of contumacy by, or refusal to obey a subpoena issued to, any person, the Attorney General may invoke the aid of any court of the United States within the jurisdiction of which such investigation or proceeding is carried on, or where such person resides or carries on business, in requiring the attendance and testimony of witnesses and the production of books, papers, or other documents. Any such court may issue an order requiring such person to appear before the Attorney General or his designee, there to produce records, if so ordered, or to give testimony touching the matter under investigation. Any failure

to obey such order of the court may be punished by such court as a contempt thereof.

"(4) All process in any such case may be served in the judicial district in which such person resides or may be found. The Attorney General may make such rules relating to civil investigations as may be necessary or appropriate to implement the provisions of this subsection.

"(e) PENALTIES.—

"(1)(A) Any juridical person that violates subsection (a) of this section shall be fined not more than $2,000,000.

"(B) Any juridical person that violates subsection (a) of this section shall be subject to a civil penalty of not more than $10,000 imposed in an action brought by the Attorney General.

"(2)(A) Any natural person who willfully violates subsection (a) of this section shall be fined not more than $100,000 or imprisoned not more than 5 years, or both.

"(B) Any natural person who violates subsection (a) of this section shall be subject to a civil penalty of not more than $10,000 imposed in an action brought by the Attorney General.

"(3) Whenever a fine is imposed under paragraph (2) upon any officer, director, employee, agent, or stockholder of a person, such fine may not be paid, directly or indirectly, by such person.

"(f) DEFINITIONS.—For purposes of this section:

"(1) The term 'person', when referring to an offender, means any natural person other than a national of the United States (as defined in section 101 of the Immigration and Nationality Act (8 U.S.C. 1101) or any corporation, partnership, association, joint-stock company, business trust, unincorporated organization, or sole proprietorship organized under the law of a foreign nation or a political subdivision thereof.

"(2)(A) The term 'foreign official' means any officer or employee of a foreign government or any department, agency, or instrumentality thereof, or of a public international organization, or any person acting in an official capacity for or on behalf of any such government or department, agency, or instrumentality, or for or on behalf of any such public international organization.

"(B) For purposes of subparagraph (A), the term 'public international organization' means—

"(i) an organization that is designated by Executive order pursuant to section 1 of the International Organizations Immunities Act (22 U.S.C. 288); or

"(ii) any other international organization that is designated by the President by Executive order for the purposes of this section, effective as of the date of publication of such order in the Federal Register.

"(3)(A) A person's state of mind is knowing, with respect to conduct, a circumstance or a result if—

"(i) such person is aware that such person is engaging in such conduct, that such circumstance exists, or that such result is substantially certain to occur; or

"(ii) such person has a firm belief that such circumstance exists or that such result is substantially certain to occur.

"(B) When knowledge of the existence of a particular circumstance is required for an offense, such knowledge is established if a person is aware of a high probability of the existence of such circumstance, unless the person actually believes that such circumstance does not exist.

"(4)(A) The term 'routine governmental action' means only an action which is ordinarily and commonly performed by a foreign official in—

"(i) obtaining permits, licenses, or other official documents to qualify a person to do business in a foreign country;

"(ii) processing governmental papers, such as visas and work orders;

"(iii) providing police protection, mail pick-up and delivery, or scheduling inspections associated with contract performance or inspections related to transit of goods across country;

"(iv) providing phone service, power and water supply, loading and unloading cargo, or protecting perishable products or commodities from deterioration; or

"(v) actions of a similar nature.

"(B) The term 'routine governmental action' does not include any decision by a foreign official whether, or on what terms, to award new business to or to continue business with a particular party, or any action taken by a foreign official

involved in the decision-making process to encourage a decision to award new business to or continue business with a particular party.

"(5) The term 'interstate commerce' means trade, commerce, transportation, or communication among the several States, or between any foreign country and any State or between any State and any place or ship outside thereof, and such term includes the intrastate use of—

"(A) a telephone or other interstate means of communication, or

"(B) any other interstate instrumentality.".

SEC. 5. TREATMENT OF INTERNATIONAL ORGANIZATIONS PROVIDING COMMERCIAL COMMUNICATIONS SERVICES.

(a) DEFINITION.—For purposes of this section:

(1) INTERNATIONAL ORGANIZATION PROVIDING COMMERCIAL COMMUNICATIONS SERVICES.—The term "international organization providing commercial communications services" means—

(A) the International Telecommunications Satellite Organization established pursuant to the Agreement Relating to the International Telecommunications Satellite Organization; and

(B) the International Mobile Satellite Organization established pursuant to the Convention on the International Maritime Satellite Organization.

(2) PRO-COMPETITIVE PRIVATIZATION.—The term "pro-competitive privatization" means a privatization that the President determines to be consistent with the United States policy of obtaining full and open competition to such organizations (or their successors), and nondiscriminatory market access, in the provision of satellite services.

(b) TREATMENT AS PUBLIC INTERNATIONAL ORGANIZATIONS.—

(1) TREATMENT.—An international organization providing commercial communications services shall be treated as a public international organization for purposes of section 30A of the Securities Exchange Act of 1934 (15 U.S.C. 78dd–1) and sections 104 and 104A of the Foreign Corrupt Practices Act of 1977 (15 U.S.C. 78dd–2) until such time as the President certifies to the Committee on Commerce of the House of Representatives and the Committees on Banking, Housing and Urban Affairs and Commerce, Science, and Transportation that such international organization providing commercial communications services has achieved a pro-competitive privatization.

(2) LIMITATION ON EFFECT OF TREATMENT.—The requirement for a certification under paragraph (1), and any certification made under such paragraph, shall not be construed to affect the administration by the Federal Communications Commission of the Communications Act of 1934 in authorizing the provision of services to, from, or within the United States over space segment of the international satellite organizations, or the privatized affiliates or successors thereof.

(c) EXTENSION OF LEGAL PROCESS.—

(1) IN GENERAL.—Except as specifically and expressly required by mandatory obligations in international agreements to which the United States is a party, an international organization providing commercial communications services, its officials and employees, and its records shall not be accorded immunity from suit or legal process for any act or omission taken in connection with such organization's capacity as a provider, directly or indirectly, of commercial telecommunications services to, from, or within the United States.

(2) NO EFFECT ON PERSONAL LIABILITY.—Paragraph (1) shall not affect any immunity from personal liability of any individual who is an official or employee of an international organization providing commercial communications services.

(d) ELIMINATION OR LIMITATION OF EXCEPTIONS.—The President and the Federal Communications Commission shall, in a manner that is consistent with specific and express requirements in mandatory obligations in international agreements to which the United States is a party—

(1) expeditiously take all actions necessary to eliminate or to limit substantially any privileges or immunities accorded to an international organization providing commercial communications services, its officials, its employees, or its records from suit or legal process for any act or omission taken in connection with such organization's capacity as a provider, directly or indirectly, of commercial telecommunications services to, from, or within the United States, that are not eliminated by subsection (c);

(2) expeditiously take all appropriate actions necessary to eliminate or to reduce substantially all privileges and immunities not eliminated pursuant to paragraph (1); and

(3) report to the Committee on Commerce of the House of Representatives and the Committee on Commerce, Science, and Transportation of the Senate on any remaining privileges and immunities of an international organization providing commercial communications services within 90 days of the effective date of this act and semiannually thereafter.

(e) PRESERVATION OF LAW ENFORCEMENT AND INTELLIGENCE FUNCTIONS.—Nothing in subsection (c) or (d) of this section shall affect any immunity from suit or legal process of an international organization providing commercial communications services, or the privatized affiliates or successors thereof, for acts or omissions—

(1) under chapters 119, 121, 206, or 601 of title 18, United States Code, the Foreign Intelligence Surveillance Act of 1978 (50 U.S.C. 1801 et seq.), section 514 of the Comprehensive Drug Abuse Prevention and Control Act of 1970 (21 U.S.C. 884), or Rules 104, 501, or 608 of the Federal Rules of Evidence;

(2) under similar State laws providing protection to service providers cooperating with law enforcement agencies pursuant to State electronic surveillance or evidence laws, rules, regulations, or procedures; or

(3) pursuant to a court order.

(f) RULES OF CONSTRUCTION.—

(1) NEGOTIATIONS.—Nothing in this section shall affect the President's existing constitutional authority regarding the time, scope, and objectives of international negotiations.

(2) PRIVATIZATION.—Nothing in this section shall be construed as legislative authorization for the privatization of INTELSAT or Inmarsat, nor to increase the President's authority with respect to negotiations concerning such privatization.

SEC. 6. ENFORCEMENT AND MONITORING.

(a) REPORTS REQUIRED.—Not later than July 1 of 1999 and each of the 5 succeeding years, the Secretary of Commerce shall submit to the Committee on Commerce of the House of Representatives and the Committee on Banking, Housing, and Urban Affairs of the Senate a report that contains the following information with respect to implementation of the Convention:

(1) RATIFICATION.—A list of the countries that have ratified the Convention, the dates of ratification by such countries, and the entry into force for each such country.

(2) DOMESTIC LEGISLATION.—A description of domestic laws enacted by each party to the Convention that implement commitments under the Convention, and assessment of the compatibility of such laws with the Convention.

(3) ENFORCEMENT.—As assessment of the measures taken by each party to the Convention during the previous year to fulfill its obligations under the Convention and achieve its object and purpose including—

(A) an assessment of the enforcement of the domestic laws described in paragraph (2);

(B) an assessment of the efforts by each such party to promote public awareness of such domestic laws and the achievement of such object and purpose; and

(C) an assessment of the effectiveness, transparency, and viability of the monitoring process for the Convention, including its inclusion of input from the private sector and non-governmental organizations.

(4) LAWS PROHIBITING TAX DEDUCTION OF BRIBES.—An explanation of the domestic laws enacted by each party to the Convention that would prohibit the deduction of bribes in the computation of domestic taxes.

(5) NEW SIGNATORIES.—A description of efforts to expand international participation in the Convention by adding new signatories to the Convention and by assuring that all countries which are or become members of the Organization for Economic Cooperation and Development are also parties to the Convention.

(6) SUBSEQUENT EFFORTS.—An assessment of the status of efforts to strengthen the Convention by extending the prohibitions contained in the Convention to cover bribes to political parties, party officials, and candidates for political office.

(7) ADVANTAGES.—Advantages, in terms of immunities, market access, or otherwise, in the countries or regions served by the organizations described in section 5(a), the reason for such advantages, and an assessment of progress toward fulfilling the policy described in that section.

(8) BRIBERY AND TRANSPARENCY.—An assessment of anti-bribery programs and transparency with respect to each of the international organizations covered by this Act.

(b) DEFINITION.—For purposes of this section, the term "Convention" means the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions adopted on November 21, 1997, and signed on December 17, 1997, by the United States and 32 other nations.

PURPOSE AND SUMMARY

H.R. 4353, the International Anti-Bribery and Fair Competition Act of 1998, amends the Securities Exchange Act of 1934 and the Foreign Corrupt Practices Act of 1977 to improve the competitiveness of American business and promote foreign commerce. The bill includes implementing language for the Organization for Economic Cooperation and Development (OECD) Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (the OECD Convention). The bill also includes reporting requirements to monitor the implementation and enforcement of other nations' commitments under the OECD Convention and a section to promote the reduction of privileges and immunities for international organizations providing commercial communications services (*e.g.,* INTELSAT and Inmarsat).

BACKGROUND AND NEED FOR LEGISLATION

This legislation is designed to level the playing field for business worldwide by seeking to reduce foreign bribery generally as well as special privileges and immunities from law in the satellite industry.

Investigations by the Securities and Exchange Commission (SEC) in the mid-1970s revealed that over 400 U.S. companies admitted making questionable or illegal payments in excess of $300 million to foreign government officials, politicians, and political parties. Many public companies maintained cash "slush funds" from which illegal campaign contributions were being made in the United States and illegal bribes were being paid to foreign officials. Scandals involving payments by U.S. companies to public officials in Japan, Italy, and Mexico led to political repercussions within those countries and damaged the reputation of American companies throughout the world.

In the wake of these disclosures, Congress enacted the Foreign Corrupt Practices Act of 1977 (the FCPA). The Foreign Corrupt Practices Act of 1977, Pub. L. No. 95–213, 91 Stat. 1494, 15 U.S.C. §§78m, 78dd–1, 78dd–2, 78ff (1998), *as amended by* the Omnibus Trade and Competitiveness Act of 1988 §§5001–5003, Pub. L. No. 100–418, (H.R. 4848). The FCPA amended the Securities Exchange Act of 1934, 15 U.S.C. § 78 *et seq*., to require issuers of publicly traded securities to institute adequate accounting controls and to maintain accurate books and records. Civil and criminal penalties were enacted for the failure to do so. In addition, the FCPA required both issuers and all other U.S. nationals or residents, as well as U.S. business entities and foreign entities with their primary place of business in the United States (defined as "domestic concerns") to refrain from making any unlawful payments to public officials, political parties, party officials, or candidates for public office, directly or through others, for the purpose of causing that person to make a decision or take an action, or refrain from taking an action, for the purpose of obtaining or retaining business.

Since the passage of the FCPA, American businesses have operated at a disadvantage relative to foreign competitors who have continued to pay bribes without fear of penalty. *See, Trade Promotion Coordinating Committee Sixth Annual Report to the United States Congress, The National Export Strategy* (Sept. 1998). Such bribery is estimated to affect international contracts valued in the billions of dollars each year. Some of our trading partners have explicitly encouraged and subsidized such bribes by permitting businesses to claim them as tax-deductible business expenses. *Id.*

Beginning in 1989, the U.S. government began an effort to convince our trading partners at the OECD to criminalize the bribery of foreign public officials. Achieving comparable prohibitions in other developed countries and combating corruption generally has been a major priority of the U.S. business community, the U.S. Congress, and successive Administrations since the late 1970s.

International bribery and corruption continue to be problems worldwide. They undermine the goals of fostering economic development, trade liberalization, and achieving a level playing field throughout the world for businesses. It is impossible to calculate with certainty the losses suffered by U.S. businesses due to bribery by foreign competitors. The Commerce Department has stated that it has learned of significant allegations of bribery by foreign firms in approximately 240 international commercial contracts since mid-1994 valued at nearly $108 billion. *Id.* This legislation, coupled with implementation of the OECD Convention by our major trading partners, is designed to result in a substantial leveling of the playing field for U.S. businesses.

The goal of the United States is the promotion of stronger, more reliable, and transparent foreign legal regimes that, in turn, make for more reliable and attractive investment climates. Rather than competing directly on the price and quality of products and services, companies competing against firms paying bribes may lose to someone offering an inferior deal. Competition without bribery gives the buyer the best value for the money. Moreover, countries that have the most corruption have trouble attracting foreign investment because the need to bribe acts as a substantial added tax on the investor.

Fortunately, in the 1990s the international community has made a concerted effort in the fight against corruption. Gradually, as awareness of the effects of transnational bribery became more apparent, progress was made in efforts to combat bribery overseas. After almost four years of substantial work in the OECD's Working Group on Bribery, on May 27, 1994, the OECD Council approved a Recommendation on Bribery in International Business Transactions (the Recommendations). The 29 OECD member states agreed that bribery distorts international competitive conditions; that all countries share a responsibility to combat bribery in international business transactions, however their nationals may be involved; and that further action is needed on the national and international level. *Id.* Member states agreed to "take concrete and meaningful steps" to meet the goal of deterring, preventing, and combating bribery of foreign officials. However, the Recommendation did not require each member state to criminalize the bribery of officials of another country.

These efforts ultimately culminated in the signing of the Organization for Economic Cooperation and Development Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (the OECD Convention). Thirty-three countries, composed of most of the world's largest trading nations, signed the OECD Convention on December 17, 1997. For twenty years after the passage of the Foreign Corrupt Practices Act, the United States was virtually alone in criminalizing foreign bribery. Now, thirty-four other countries have taken a step in this direction. Twenty-eight of the twenty-nine OECD member countries along with five other countries, Argentina, Bulgaria, Brazil, Chile, and the Slovak Republic, signed the OECD Convention. Australia, the only OECD member which did not sign, participated in the negotiations and adoption of the OECD Convention. Because of new internal treaty processes of the Australian parliament, Australia cannot sign the OECD Convention until it has completed its necessary national procedures. However, the Commerce Department expects Australia to sign and ratify the OECD Convention by the December 31, 1998 deadline.

Under the OECD Convention:

The U.S. and its trading partners agreed to criminalize bribery of foreign public officials, including officials in all branches of government, and to criminalize payments to officials of public agencies and public international organizations;

The OECD Convention also calls for criminal penalties for those who bribe foreign public officials. If a nation's legal system lacks the concept of corporate criminal liability, the nation must provide for equivalent non-criminal sanctions, such as fines;

Parties to the agreement pledged to work to provide legal assistance in investigations and proceedings within the scope of the OECD Convention and to make bribery of foreign public officials an extraditable offense; and

The OECD Convention requires the Parties to cooperate in an OECD follow-up program to monitor and promote full implementation.

This legislation amends the FCPA to conform it to the requirements of and to implement the OECD Convention.

INTERGOVERNMENTAL SATELLITE ORGANIZATIONS

The International Telecommunications Satellite Organization (INTELSAT) is a global communications satellite cooperative with 143 member countries which provides space segment for international telecommunications and is the world's primary provider of international "fixed" satellite services (*e.g.,* transoceanic telephone calls, video feeds). The International Mobile Satellite Organization (Inmarsat) developed out of the perceived need for a global maritime communications satellite system that would provide distress, safety, and communications services to seafaring nations in a cooperative, cost-sharing entity. Inmarsat began providing commercial service in 1982. Today, Inmarsat has 82 member countries.

INTELSAT and Inmarsat are controlled by "Parties" and "signatories." The Parties, which are the national *government* members of the INTELSAT and Inmarsat agreements, have ultimate control.

The signatories hold ownership interests and assist with the operation and management of the systems and are distributors of INTELSAT and Inmarsat services in their own country. Many signatories are government-owned or controlled telecommunications monopolies or dominant service providers. There are many ways to "control" access to markets. Legal control is one means. Control through facilities ownership or influence with authorities are others. For example, France Telecom, which is the dominant provider of telecommunications services in France, is the signatory to INTELSAT and Inmarsat. In some markets, the signatory is the actual licensing body for that country.

The ownership structure of the intergovernmental satellite organizations (IGOs) provides them with advantages in terms of market access and regulatory processes over their competitors and potential competitors. Changing this structure by ending or reducing ownership by government owned or controlled entities would greatly facilitate opening markets to competitive suppliers of telecommunications services and would help lower the costs of international communications for the benefit of consumers in the United States and worldwide.

The U.S. is the largest user in both systems and, since ownership is based on usage, currently holds an approximately 18 percent ownership share in INTELSAT and 23 percent ownership share in Inmarsat. The U.S. signatory to INTELSAT and Inmarsat is COMSAT, which Congress determined was subject to the antitrust laws and which was created in order to facilitate our policy goal of having an independent entity, organized to maintain and strengthen competition, as our signatory. This pro-competitive policy is described in section 102(c) of the Communications Satellite Act of 1962, as amended (the Satellite Act or 1962 Act); 47 U.S.C. 701(c):

> In order to facilitate this development and to provide for the widest possible participation by private enterprise, United States participation in the global market shall be in the form of a private corporation, subject to appropriate governmental regulation. It is the intent of Congress that all authorized users have nondiscriminatory access to the system; that maximum competition be maintained in the provision of equipment and services utilized by the system; that the corporation created under this Act be so organized and operated as to maintain and strengthen competition in the provision of communications services to the public; and that the activities of the corporation created under this Act and of the persons or companies participating in the ownership of the corporation shall be consistent with the Federal antitrust laws.

The Satellite Act also empowers the Federal Communications Commission (the FCC or the Commission) in its administration of the Communications Act of 1934, as amended, to assure nondiscriminatory use of and equitable access to the satellite system. *See* Section 201(c)(2) of the Satellite Act; 47 U.S.C. 721(c)(2). The Satellite Act also gives the Commission discretion in implementing this provision by regulating the manner in which facilities of the system and stations are allocated among users. *Id.* Thus Congress

sought to promote competition in this market by permitting broad availability of the systems to carriers and users.

The Committee included language to address the special advantages of the intergovernmental satellite organizations and to ensure that they do not improperly escape coverage by the FCPA. Thus the legislation makes it clear that bribery of intergovernmental satellite organizations does not escape the coverage of the FCPA through a privatization which is not deemed pro-competitive. It also seeks to remove the special advantages of such organizations, in particular privileges and immunities. The Committee intends that American companies should not suffer competitive disadvantages due to either foreign bribery, or due to privileges and immunities resulting from the fact that the intergovernmental satellite organizations have not yet achieved the U.S. policy of obtaining a pro-competitive privatization.

PRIVILEGES AND IMMUNITIES

INTELSAT and Inmarsat enjoy a range of privileges and immunities, such as tax exemptions, immunity from lawsuits, potential antitrust immunity, and preferential access to orbital locations. These privileges and immunities may make it difficult for private competitors to obtain legal redress for anti-competitive activities that INTELSAT and Inmarsat may engage in. These privileges and immunities could distort competition which would be detrimental to the interests of consumers and American workers.

The legal status of INTELSAT's and Inmarsat's immunity from suit and legal process is unclear. Under U.S. law, international organizations such as INTELSAT and Inmarsat generally have the same immunity as foreign governments, and the Foreign Sovereign Immunities Act (FSIA), 28 U.S.C. §§1602 *et seq.,* provides that foreign governments are not immune for actions taken in connection with their commercial activities. However, there is a lack of case law on this issue. It is particularly important to resolve this issue in the context of INTELSAT and Inmarsat, whose primary mission (unlike the primary missions of other international organizations) is to provide commercial services.

These privileges and immunities make it more difficult for private companies to compete against these intergovernmental organizations. Such privileges and immunities give INTELSAT and Inmarsat a commercial advantage which their competitors cannot match and which make it more difficult for the competitors to have nondiscriminatory access to satellite telecommunications markets in countries that are members of INTELSAT and Inmarsat. Just as implementing the OECD Convention is designed to help level the playing field for American business overseas through reduction of bribery, reduction of immunities from law will help level the playing field for business by applying the same laws to the intergovernmental satellite organizations that apply to their would-be private sector competitors.

Thus this legislation addresses the issue of privileges and immunities and clarifies the law on this issue. It provides that INTELSAT and Inmarsat are not immune from suit or legal process in connection with their commercial activities, which include provision of commercial communications services. Further, this leg-

islation directs the President and the Commission to substantially limit or eliminate other privileges and immunities that INTELSAT and Inmarsat presently enjoy.

LEGAL ANALYSIS

There may be an open question as to the extent to which INTELSAT and Inmarsat are currently subject to suit and legal process in connection with their commercial activities. The lack of clear standards is apparent from a review of INTELSAT's and Inmarsat's organizational documents, the International Organizations Immunities Act (IOIA), 22 U.S.C. § 288 *et seq.,* the Foreign Sovereign Immunities Act, and relevant court decisions.

In the case of INTELSAT, neither the Agreement Relating to the International Telecommunications Satellite Organization (the INTELSAT Agreement), TIAS 7532, nor its implementing agreement, the INTELSAT Headquarters Agreement (the INTELSAT HQ Agreement), TIAS 8542, provides clear guidance on the issue of immunity. Article XV(c) of the INTELSAT Agreement states that the Party in whose territory INTELSAT's headquarters is located (*i.e.,* the United States) shall grant privileges, exemptions, and immunities "in accordance with the Headquarters Agreement," and that the other Parties shall make a grant "in accordance with the [privileges, exemptions, and immunities] Protocol."

Article XV(c) does not, however, specify what the privileges, exemptions, and immunities should be, other than to state that they should be "appropriate," and that, as to "immunity from legal process in respect of acts done or words written or spoken in the exercise of . . . [officers' and employees'] duties," the privileges, exemptions, and immunities should be "to the extent and in the cases to be provided for in the Headquarters Agreement and Protocol."

The INTELSAT Headquarters Agreement also leaves largely unanswered the question of to what extent INTELSAT and its officials are immune from suit or legal process. Section 16 of the INTELSAT Headquarters Agreement affords immunity "from suit and legal process" to "[t]he officers and employees of INTELSAT, the representatives of the Parties and of the Signatories and persons participating in arbitration proceedings pursuant to the INTELSAT Agreement." This immunity, however, is limited to "acts performed by them in their official capacity and falling within their functions," and section 16 does not elaborate upon the intended meaning of those terms.

The INTELSAT Protocol suggests that the parties to the INTELSAT Agreement never intended for INTELSAT to be immune for its commercial activities. *See* Protocol on INTELSAT Privileges, Exemptions, and Immunities, May 19, 1978. The Protocol implements the same immunity language in Article XV(c) of the INTELSAT Agreement as the INTELSAT Headquarters Agreement implements, and governs INTELSAT's privileges, immunities, and exemptions in all INTELSAT member nations other than the United States. Article III, Section 1 of the Protocol states that INTELSAT's "immunity from jurisdiction and immunity from execution" does not apply "in respect of its commercial activities." Thus, apparently the other parties to INTELSAT have taken the position that Article XV(c) confers no immunity for commercial ac-

tivities to INTELSAT, its parties, or its signatories, but the status of commercial activities in the United States has not been as explicitly addressed.

The International Organizations Immunities Act (IOIA), which applies to INTELSAT through an implementing Executive Order, limits immunity for international organizations to the immunities granted to "foreign governments." The IOIA also provides that the President may restrict the immunity of any particular organization. The reason for this reservation of right was to "permit the adjustment or limitation of the privileges in the event that any international organization should engage, for example, in activities of a commercial nature." S. Rep. No. 861, 79th Cong., 1st Sess. 4 (1945).

In 1976, Congress passed the Foreign Sovereign Immunities Act (FSIA). The FSIA provides that foreign governments are not immune for any "action [that] is based upon a commercial activity carried on in the United States by the foreign state; or upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere; or upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that the act causes a direct effect in the United States." 28 U.S.C. §1605(a)(2). Although the IOIA affords international organizations the same immunity as foreign governments, the FSIA did not explicitly mention the IOIA. *See Broadbent* v. *Organization of American States,* 628 F.2d 27 (D.C. Cir. 1980).

The Inmarsat agreements, like those regarding INTELSAT, do not speak meaningfully to the issue of the scope of immunity. This legislation helps define the scope of that immunity. The extent to which immunity applies to commercial activities has been unclear not only with respect to INTELSAT and Inmarsat, but also in the case of their U.S. signatory, Comsat. Comsat is neither an international organization nor a foreign government. As a result, Comsat itself has no antitrust immunity, and the Satellite Act expressly subjects Comsat to the antitrust laws.

One court, however, has held Comsat to be immune from antitrust liability for actions Comsat took in connection with INTELSAT's commercial role of providing communications satellite services. In *Alpha Lyracom* v. *Communications Satellite Corporation,* 946 F.2d 168, 174 (2d Cir. 1991), *cert. denied,* 502 U.S. 1096 (1992), the court concluded that section 16 of the INTELSAT Headquarters Agreement, when read in conjunction with Article XV of the INTELSAT Agreement, granted immunity to Comsat when it is engaged in signatory activities, without regard to whether the signatory activities concerned INTELSAT's commercial functions. Further, on remand, the Federal District Court for the Southern District of New York concluded that Comsat's signatory immunity extended to its participation in an INTELSAT resolution calling for a boycott of private satellite systems. *Alpha Lyracom Space Communications, Inc.* v. *Comsat Corporation,* 968 F. Supp. 876 (S.D.N.Y. 1996). The Second Circuit affirmed, finding that "Comsat's activities in connection with a so-called "boycott resolution," adopted and reaffirmed at meetings of INTELSAT, were immune from discovery and could not be considered as evidence to

support . . . [a separate system's] antitrust claims." 113 F.3d 372 (2d Cir. 1997).

The FCC has found that the immunity from antitrust that the court in *Alpha Lyracom* found to be conferred on Comsat provides Comsat with a "competitive advantage" that "allows commercial decisions and activities to be conducted under a cloak of immunity unavailable to Comsat's competitors." *Amendment of the Commission's Regulatory Policies to Allow Non-U.S. Licensed Space Stations to Provide Domestic and International Satellite Service in the United States,* FCC 97–399 (Nov. 26, 1997) at ¶ 125.

FEDERAL COMMUNICATIONS COMMISSION

The Commission has in the past worked to eliminate immunities associated with the intergovernmental satellite organizations.

In *The Merger of MCI Communications Corporation and British Telecommunication plc,* FCC 97–302 (Sept. 24, 1997), the FCC conditioned its approval of the proposed merger between British Telecommunications plc (BT) and MCI Communications Corporation on BT making "a waiver of any claim to immunity from U.S. antitrust laws acting in its capacity as signatory to INTELSAT * * * as such immunity may apply to BT's provision of services in the United States." Id. ¶ 328 (Note that this merger addressed in this decision did not ultimately occur).

In its "DISCO II" decision, the FCC held that it would "require Comsat to make an appropriate waiver of immunity from any suit as part of its application to provide *domestic* services via INTELSAT or Inmarsat." *Amendment of the Commission's Regulatory Policies to Allow Non-U.S. Licensed Space Stations to Provide Domestic and International Satellite Service in the United States,* 12 FCC Rcd 24094 (1997) at ¶ 126 (emphasis in original).

The FCC also determined that it should continue to regulate Comsat as a dominant carrier in the provision of switched voice, private line, and occasional-use video service in non-competitive markets because, among other reasons, Comsat had not made "an appropriate waiver * * * of its immunity, in form and substance satisfactory to the [Federal Communications] Commission." *Comsat Corporation,* FCC 98–78 (Apr. 28, 1998) at ¶ 162.

HEARINGS

The Subcommittee on Finance and Hazardous Materials held a hearing on H.R. 4353, the International Anti-Bribery and Fair Competition Act of 1998, on September 10, 1998. Appearing before the Subcommittee were Mr. Andrew Pincus, General Counsel, Office of General Counsel, U.S. Department of Commerce, on behalf of the Administration, and Mr. Paul V. Gerlach, Associate Director, Division of Enforcement, Securities and Exchange Commission.

COMMITTEE CONSIDERATION

On September 16, 1998, the Subcommittee on Finance and Hazardous Materials met in open markup session and approved H.R. 4353, the International Anti-Bribery and Fair Competition Act of 1998, for Full Committee consideration, amended, by a voice vote. On September 24, 1998, the Full Committee met in open markup

session and ordered H.R. 4353 reported to the House, amended, by a voice vote, a quorum being present.

ROLLCALL VOTES

Clause 2(l)(2)(B) of rule XI of the Rules of the House requires the Committee to list the recorded votes on the motion to report legislation and amendments thereto. There were no recorded votes taken in connection with ordering H.R. 4353 reported. An Amendment in the Nature of Substitute offered by Mr. Oxley was adopted by a voice vote. A motion by Mr. Bliley to order H.R. 4353 reported to the House, amended, was agreed to by a voice vote, a quorum being present.

COMMITTEE OVERSIGHT FINDINGS

Pursuant to clause 2(l)(3)(A) of rule XI of the Rules of the House of Representatives, the Committee held a legislative hearing and made findings that are reflected in this report.

COMMITTEE ON GOVERNMENT REFORM AND OVERSIGHT

Pursuant to clause 2(l)(3)(D) of rule XI of the Rules of the House of Representatives, no oversight findings have been submitted to the Committee by the Committee on Government Reform and Oversight.

NEW BUDGET AUTHORITY, ENTITLEMENT AUTHORITY, AND TAX EXPENDITURES

In compliance with clause 2(l)(3)(B) of rule XI of the Rules of the House of Representatives, the Committee finds that H.R. 4353, the International Anti-Bribery and Fair Competition Act of 1998, would result in no new or increased budget authority, entitlement authority, or tax expenditures or revenues.

COMMITTEE COST ESTIMATE

The Committee adopts as its own the cost estimate prepared by the Director of the Congressional Budget Office pursuant to section 402 of the Congressional Budget Act of 1974.

CONGRESSIONAL BUDGET OFFICE ESTIMATE

Pursuant to clause 2(l)(3)(C) of rule XI of the Rules of the House of Representatives, the following is the cost estimate provided by the Congressional Budget Office pursuant to section 402 of the Congressional Budget Act of 1974:

U.S. CONGRESS,
CONGRESSIONAL BUDGET OFFICE,
Washington, DC, September 30, 1998.

Hon. TOM BLILEY,
Chairman, Committee on Commerce,
House of Representatives, Washington, DC.

DEAR MR. CHAIRMAN: The Congressional Budget Office has prepared the enclosed cost estimate for H.R. 4353, the International Anti-Bribery and Fair competition Act of 1998.

If you wish further details on this estimate, we will be pleased to provide them. The CBO staff contacts are Mark Grabowicz and Mark Hadley.

Sincerely,

JUNE E. O'NEILL, *Director.*

Enclosure.

H.R. 4353—International Anti-Bribery and Fair Competition Act of 1998

CBO estimates that implementing H.R. 4353 would not result in any significant cost to the federal government. Because enactment of the bill could affect direct spending and receipts, pay-as-you-go procedures would apply. However, CBO estimates that any impact on direct spending and receipts would not be significant.

CBO has determined that this legislation is excluded from the application of the Unfunded Mandates Reform Act (UMRA) because it would amend the Foreign Corrupt Practices Act (FCPA) and other laws in ways that are necessary to implement the Organization for Economic Cooperation and Development Convention on Combating Bribery of Foreign Public Officials in International Business Transactions. Section 4 of UMRA excludes from the application of that act any legislative provisions that are necessary for the ratification or implementation of international treaty obligations.

H.R. 4353 would expand the FCPA to cover additional offenses relating to corporate bribery of foreign officials. As a result, the federal government would be able to pursue cases that it otherwise would not be able to prosecute. CBO expects that the government probably would not pursue many such cases, however, so we estimate that any increase in federal costs for law enforcement, court proceedings, or prison operations would not be significant. Any such additional costs would be subject to the availability of appropriated funds.

Because those prosecuted and convicted under the bill could be subject to civil and criminal fines, the federal government might collect additional fines (which are categorized as governmental receipts) if the bill is enacted. However, CBO expects that any additional fines would be negligible because of the small number of cases involved. Collections of criminal fines are deposited in the Crime Victims Fund and spent in the following year. Because any increase in direct spending would equal the fines collected with a one-year lag, the additional direct spending from the Crime Victims Fund also would be negligible.

H.R. 4353 would require the Department of Commerce to submit reports each year during the 1999–2004 period detailing the enforcement and monitoring efforts of foreign countries that ratified the convention. Based on information from the department, CBO estimates that such efforts would cost less than $500,000 a year and would be subject to the availability of appropriated funds.

The CBO staff contacts for this estimate are Mark Grabowicz and Mark Hadley. This estimate was approved by Paul N. Van de Water, Assistant Director for Budget Analysis.

FEDERAL MANDATES STATEMENT

The Committee adopts as its own the estimate of Federal mandates prepared by the Director of the Congressional Budget Office pursuant to section 423 of the Unfunded Mandates Reform Act.

ADVISORY COMMITTEE STATEMENT

No advisory committees within the meaning of section 5(b) of the Federal Advisory Committee Act were created by this legislation.

CONSTITUTIONAL AUTHORITY STATEMENT

Pursuant to clause 2(l)(4) of rule XI of the Rules of the House of Representatives, the Committee finds that the Constitutional authority for this legislation is provided in Article I, section 8, clause 3, which grants Congress the power to regulate commerce with foreign nations, among the several States, and with the Indian tribes.

APPLICABILITY TO LEGISLATIVE BRANCH

The Committee finds that the legislation does not relate to the terms and conditions of employment or access to public services or accommodations within the meaning of section 102(b)(3) of the Congressional Accountability Act.

SECTION-BY-SECTION ANALYSIS OF THE LEGISLATION

Section 1.—Short title

Section 1 establishes the short title of the legislation as the "International Anti-Bribery and Fair Competition Act of 1998."

Section 2.—Amendments to the Foreign Corrupt Practices Act governing issuers

Subsection (a) implements the OECD Convention by amending § 30A of the Securities Exchange Act of 1934 (the Securities Exchange Act) to prohibit any payments made to foreign officials for the purpose of securing "any improper advantage." *See* OECD Convention, Art. 1, ¶ 1.

Subsection (b) implements the OECD Convention by amending § 30A(f)(1) of the Securities Exchange Act to expand the definition of "foreign official" to include an official of a public international organization. *See* OECD Convention, Art. 1, ¶ 4(a). Public international organizations are then defined, first, by reference to those organizations designated by Executive Order pursuant to the International Organizations Immunities Act (IOIA) (22 U.S.C. § 288), and second, by reference to any other international organization that is designated by the President for the purposes of this section. The Committee intends that citizens will be given adequate notice of such designations.

Subsection (c) implements the OECD Convention by creating an additional basis for jurisdiction over foreign bribery by U.S. issuers and U.S. persons that are officers, directors, employees, or agents, or stockholders of such issuers. *See* OECD Convention, Art. 4, ¶ 2. This section extends coverage for acts outside the United States to U.S. issuers that are organized under the laws of the United States

or of a State, territory, or commonwealth, or a political subdivision thereof and U.S. persons acting on such issuers' behalf. Under the new § 30A(g) of the Securities Exchange Act, U.S. issuers or U.S. persons acting on a U.S. issuer's behalf violate the FCPA if they make any of the payments prohibited under the existing statute outside of the United States, irrespective of whether in doing so they make any use of the mails or means or instrumentality of interstate commerce. Although this section limits liability to U.S. issuers and U.S. persons acting on U.S. issuers' behalf, it is expected that the established principles of liability, including principles of vicarious liability, that apply under the current version of the FCPA shall apply to the liability of U.S. issuers for acts taken on their behalf by their officers, directors, employees, agents, or stockholders outside the territory of the United States, regardless of the nationality of the officer, director, employee, agent, or stockholder. The subsection also inserts references to the new offense in the provisions of the existing statute governing exceptions and affirmative defenses.

Subsection (d) implements the OECD Convention by amending § 32(c) of the Securities Exchange Act (15 U.S.C. 78 ff (c)) to eliminate the current disparity in treatment between U.S. nationals that are employees or agents of issuers and foreign nationals that are employees or agents of issuers. Presently, foreign nationals who are employees or agents (as opposed to officers or directors) are subject only to civil sanctions. Eliminating this preferential treatment implements the OECD Convention's requirement that "[e]ach Party shall take such measures as may be necessary to establish that it is a criminal offense under its law for any person to [make unlawful payments]." OECD Convention, Article 1. In addition, subsection (d) provides that the same penalties shall apply to issuers for violation of the new provisions for acts outside the United States as apply to violations of the existing statute.

Section 3.—Amendments to the Foreign Corrupt Practices Act governing domestic concerns

Subsection (a) implements the OECD Convention by amending § 104(a) of the FCPA to prohibit any payments made to foreign officials for the purpose of securing "any improper advantage," Art. 1, ¶ 1.

Subsection (b) implements the OECD Convention by eliminating the current disparity in treatment between U.S. nationals that are employees or agents of domestic concerns and foreign nationals that are employees or agents of domestic concerns. Presently, foreign nationals who are employees or agents (as opposed to officers or directors) are subject only to civil sanctions. Eliminating this preferential treatment implements the OECD Convention's requirement that "[e]ach Party shall take such measures as may be necessary to establish that it is a criminal offense under its law for any person to [make unlawful payments]." OECD Convention, Article 1. In addition, section 3(b) provides that the same penalties shall apply to U.S. persons for violation of the new § 104(i) for acts outside the United States as apply to violations of the existing FCPA.

Subsection (c) implements the OECD Convention by amending § 104(h)(2) of the FCPA, 15 U.S.C. 78dd–2(h)(2), to expand the definition of "foreign official" to include an official of a public international organization. *See* OECD Convention, Art. 1, ¶ 4(a). Public international organizations are then defined, first, by reference to those organizations designated by Executive order pursuant to the International Organizations Immunities Act (22 U.S.C. § 288), and second, by reference to any other international organization that is designated by the President for the purposes of this section. The Committee intends that citizens will be given adequate notice of such designations.

Subsection (d) implements the OECD Convention by creating an additional basis for jurisdiction over foreign bribery by U.S. persons. *See* OECD Convention, Art. 4, ¶ 2. This section limits coverage to businesses organized under the laws of the United States, a State, territory, possession, or commonwealth, or a political subdivision thereof, or U.S. nationals. U.S. nationals are defined by reference to the Immigration and Nationality Act, 8 U.S.C. § 1101(22), which defines a "national of the United States" as "(A) a citizen of the United States, or (B) a person, who though not a citizen, owes permanent allegiance to the United States." Under the new § 104(i), a U.S. person violates the FCPA if it makes any of the payments prohibited under the existing statute outside of the United States, irrespective of whether in doing so it makes any use of the mails or means or instrumentality of interstate commerce. Although this section imposes liability only on U.S. persons, it is expected that the established principles of liability, including principles of vicarious liability, that apply under the current version of the FCPA shall apply to the liability of U.S. businesses for acts taken on their behalf by their officers, directors, employees, agents or stockholders outside the United States, regardless of the nationality of the officer, director, employee, agent, or stockholder. Subsection (d) also inserts references to the new offense in the provisions of the existing statute governing exceptions, affirmative defenses, and injunctive relief.

Section 4.—Amendments to the Foreign Corrupt Practices Act governing other persons

Section 4 creates a new section in the FCPA, § 104A, providing for criminal and civil penalties over persons not covered under the existing FCPA provisions regarding issuers and domestic concerns. This section closes the gap left in the original FCPA and implements the OECD Convention's requirement that Parties criminalize bribery by "any person." OECD Convention, Art. 1, ¶ 1. The prohibited acts are the same as those covered by § 30A(a) of the Securities Exchange Act, 15 U.S.C. 78dd–1(a), and § 104(a) of the FCPA, 15 U.S.C. 78dd–2(a), with two qualifications.

First, the offense created under this section requires that an act in furtherance of the bribe be taken within the territory of the United States. The OECD Convention requires each Party to "take such measures as may be necessary to establish its jurisdiction over the bribery of a foreign public official when the offense is committed in whole or in party in its territory." OECD Convention, Art. 4, ¶ 1. The new offense complies with this section by providing

for criminal jurisdiction in this country over bribery by foreign nationals of foreign officials when the foreign national takes some act in furtherance of the bribery within the territory of the United States. It is expected that the established principles of liability, including principles of vicarious liability, that apply under the current version of the FCPA shall apply to the liability of foreign businesses for acts taken on their behalf by their officers, directors, employees, agents or stockholders in the territory of the United States, regardless of the nationality of the officer, director, employee, agent, or stockholder.

As envisioned in the OECD the territorial basis for jurisdiction should be interpreted broadly so that an extensive physical connection to the bribery act is not required. *See* Commentaries on the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (OECD Commentary) at ¶ 24. Further, "territory of the United States" should be understood to encompass all areas over which the United States asserts territorial jurisdiction. *See* 18 U.S.C. § 5 ("The term 'United States', as used in this title in a territorial sense, includes all places and waters, continental or insular, subject to the jurisdiction of the United States, except the Canal Zone."); 18 U.S.C. § 7 (special maritime and territorial jurisdiction of the United States, 49 U.S.C. § 46501(2) (special aircraft jurisdiction of the United States)).

Although this section limits jurisdiction over foreign nationals and companies to instances in which the foreign national or company takes some action while physically present within the territory of the United States, Congress does not thereby intend to place a similar limit on the exercise of U.S. criminal jurisdiction over foreign nationals and companies under any other statute or regulation.

The second difference from the existing FCPA provisions is that this section expands the commerce nexus to include not only the use of the mails or any means or instrumentality of interstate commerce but "any other act" within the United States.

Section 5.—Treatment of international organizations providing commercial communications services

Subsection (a) establishes definitions and policy. Paragraph (1) defines "international organization providing commercial communications services" to mean INTELSAT and Inmarsat.

Paragraph (2) defines the term "pro-competitive privatization" for purposes of section 5 to mean one the President determines to be consistent with the U.S. policy of obtaining full and open competition to such organizations (or their successors), and nondiscriminatory market access, in the provision of satellite services. This language makes clear that it is the President who is to make a determination for purposes of applicability of section 5(b) as to whether a privatization is consistent with the U.S. policy set forth in paragraph (2). That policy is to be one of obtaining full and open competition to such organizations (or their successors), and nondiscriminatory market access.

Subsection (b) deals with the treatment of public international organizations. Paragraph (1) extends the FCPA to bribery of officials of public international organizations. Pursuant to subsection

(b)(1), the classification of INTELSAT and Inmarsat as "public international organizations" for purposes of the FCPA remains in effect until the President certifies that INTELSAT or Inmarsat, as the case may be, has achieved a "pro-competitive privatization." Prior to this certification, therefore, a prohibited payment made to an official of INTELSAT or Inmarsat will constitute a violation of the FCPA. The certification requirement is designed to ensure that neither INTELSAT nor Inmarsat falls outside the FCPA by engaging in activity that is a privatization that the President has not certified as pro-competitive pursuant to subsection a(2). The Committee expects that the President will not make this certification unless the privatization facilitates full and fair competition to INTELSAT, Inmarsat, and their successors and fosters non-discriminatory market access in the provision of satellite services. The Committee also intends that the President will seek to achieve a pro-competitive privatization described in this section 5.

Paragraph (2) states that the requirement in paragraph (1) for a Presidential certification does not affect the authority of the FCC under the Communications Act of 1934, as amended (the Communications Act), to authorize services to, from, or within the United States via the satellite systems of INTELSAT and Inmarsat, and the satellite systems of privatized affiliates and successors of INTELSAT and Inmarsat.

This paragraph clarifies that the FCC's responsibilities under the Communications Act are independent of any Presidential authority pursuant to this section. When presented with an application seeking authority to use one of these satellite systems, and regardless of whether the President has made a certification for the system pursuant to paragraph (1), the FCC must make its own determination under the Communications Act as to whether use of the system is consistent with the public convenience, interest, and necessity. In light of the fact that the Executive Branch's procedures may lack the transparency that the FCC's procedures possess, moreover, there is a risk that, absent an independent review by the FCC, the public would not have an adequate opportunity to comment on a privatization. The Commission may use any existing authority to achieve the mandates of this legislation, including requiring waiver of privileges and immunities, conditioning licenses, and conducting rulemakings.

Subsection (c) is entitled "Extension of Legal Process." Paragraph (1) states that neither INTELSAT and Inmarsat, nor their officials, employees and records, are immune from suit or legal process for acts or omissions taken in connection with INTELSAT or Inmarsat providing commercial telecommunications services to, from, or within the United States, except that immunity continues to apply to the extent "specifically and expressly required by mandatory obligations in international agreements to which the United States is a party." This legislation is designed to put the intergovernmental satellite organizations on an equal legal footing with their private sector competitors.

This paragraph provides, therefore, that INTELSAT and Inmarsat, and their officials, employees, and records, do not have immunity in connection with their commercial role of providing telecommunications services to, from, or within the United States.

The use of "directly or indirectly" in subsection (b) reflects the fact that, although INTELSAT and Inmarsat services are generally provided indirectly through a signatory such as COMSAT, it is possible with the ongoing restructuring within INTELSAT and Inmarsat that either organization will be providing services directly. The Committee uses the terms "express," "specific," "mandatory," and "obligations" because it wishes to make very clear that it intends that obligations under international agreements be narrowly construed. The Committee does not anticipate that any commercial activities will be deemed immune under any agreements to which the U.S. is party. INTELSAT's and Inmarsat's activities are almost entirely commercial. For example, INTELSAT operates a network that the Congress, in the Satellite Act, characterized as "a commercial communications satellite system," 47 U.S.C. § 701(a).

Paragraph (2) clarifies that paragraph (1) does not affect any immunity officials and employees of INTELSAT and Inmarsat may or may not have with respect to personal liability. Although paragraph (2) protects the personal funds of officials and employees of INTELSAT and Inmarsat to the extent that the officials and employees are immune, those individuals remain subject to legal process and injunctions, and similar matters, and may be required to appear as witnesses and to respond to discovery requests.

Subsection (d) requires the President and the FCC, consistent with specific and express requirements in mandatory obligations in international agreements to which the United States is a party, each act to limit or eliminate the privileges and immunities enjoyed by INTELSAT and Inmarsat. The Committee uses the terms "express," "specific," "mandatory," and "obligations" because it wishes to make clear that it intends that obligations under international agreements be narrowly construed. The Committee does not intend to require the President to abrogate international agreements to which the U.S. is a party. The Committee does intend, however, that the President and the Commission will work expeditiously to eliminate those immunities or privileges which are required by international agreements to which the U.S. is a party.

The FCC has a role in U.S. government oversight of COMSAT's participation in INTELSAT and Inmarsat which is reflected in subsection (d). The Committee intends that the Commission will use its authority under the Communications Act to take all measures necessary to protect competition in the U.S. markets and to open markets for our companies overseas through elimination of privileges and immunities.

This section explicitly requires "expeditious" action because the Committee intends for the President and Commission to act as soon as possible, and specifically not to wait pending the result of discussions with respect to privatization.

Pursuant to subsection (d)(1), the President and the FCC each expeditiously must take all actions necessary to eliminate or limit substantially any additional privileges or immunities from suit or legal process that INTELSAT or Inmarsat enjoy that subsection (c) does not already eliminate. On the part of the President, this includes seeking the revision of existing agreements to accomplish the purposes of this paragraph. The IOIA already gives the President the authority "to withhold or withdraw" from any inter-

national organization or its officers or employees "any of the privileges, exemptions, and immunities provided for [in the IOIA]," or to "condition or limit the enjoyment by any such organization or its officers or employees of any such privilege, exemption, or immunity.'

Subsection (d)(1) is also intended to require that the FCC may use any existing authority to achieve the mandates of this subsection, including requiring waiver of privileges and immunities, conditioning licenses, and conducting rulemakings.

Pursuant to subsection (d)(2), the President and the FCC must expeditiously take all appropriate actions that are necessary to eliminate or reduce substantially all privileges and immunities not eliminated by subsection (d)(1). INTELSAT and Inmarsat appear to enjoy a broad range of privileges and immunities in addition to the immunity from suit or legal process. These include immunity from import duties and taxes, immunity from income taxes, immunity from communications and property taxes, and preferential treatment in international organizations, processes and coordinations.

Subsection (d)(2) requires the President and the FCC to do whatever is necessary, including seeking the revision of international agreements, as appropriate, so that these privileges and immunities can be eliminated or reduced substantially.

The IOIA already gives the President the authority "to withhold or withdraw" from any international organization or its officers or employees "any of the privileges, exemptions, and immunities provided for [in the IOIA]," or to "condition or limit the enjoyment by any such organization or its officers or employees of any such privilege, exemption, or immunity."

Subsection (d)(3) requires the President and the FCC independently to report to the Committee and the relevant Senate Committees of jurisdiction on a semiannual basis concerning any privileges and immunities that INTELSAT and Inmarsat continue to hold. The purpose is to create a record for the Congress and the private sector to use to review the progress of the President and the Commission in eliminating such privileges and immunities. The Committee expects that, to satisfy their reporting obligations, the President and the FCC each will maintain a comprehensive inventory of remaining privileges and immunities, and will solicit information and comment from a wide range of sources and report with respect to each of INTELSAT's and Inmarsat's member countries, including with respect to the extent to which these organizations' privileges and immunities may potentially give rise to barriers to market entry or otherwise adversely affect competition.

Subsection (e) clarifies that subsections (c) and (d) do not affect INTELSAT's and Inmarsat's immunity from suit and legal process for acts or omissions: (i) under specific State and Federal laws for the benefit of law enforcement and intelligence activities; and (ii) pursuant to court orders. Subsection (e) expresses the intent of Congress that nothing in the preceding sections removing or urging the removal of privileges and immunities from international organizations providing commercial communications services shall be deemed to affect privileges and immunities conferred by the U.S. and State constitutions, statutes, rules and common law that pertain to cooperation with law enforcement and intelligence agencies.

This is in no way designed to narrow the elimination of immunities traditionally associated with such international organizations; it is merely designed to make it clear that this section does not eliminate the law enforcement or intelligence related immunities such organizations would have if they were private companies.

Subsection (f)(1) provides that nothing in section 5 shall affect the President's existing constitutional authority regarding the time, scope, and objectives of international negotiations. While the Committee understands that in the absence of a constitutional amendment legislation cannot modify the Constitution's allocations of power between the Congress and the Executive, in order to clarify the Committee's intent and address concerns in this regard some have raised, this subsection makes clear that this section does not attempt to change the President's constitutional authority with respect to international negotiations. Similarly, this language is not meant to change the constitutional authority of the Congress in this regard.

Subsection (f)(2) makes clear that section 5 does not provide legislative authority or implementing legislation for a privatization plan for INTELSAT or Inmarsat. Moreover, the Committee expects the President will faithfully execute the U.S. law with respect to Inmarsat and its privatization plan.

Section 6.—Enforcement and monitoring

Subsection (a) requires the Secretary of Commerce to submit, not later than July 1, 1999, and for each of the five succeeding years, a report to the House of Representatives and Senate. The Committee intends the report to be thoroughly researched and to contain considerable detail. The Committee expects Commerce Department officials to consult with the Congress prior to filing the report.

First, the report is to contain a list of the countries that have ratified the OECD Convention, the dates of ratification, and the date on which the OECD Convention has entered into force for those countries. With respect to those countries that have not ratified, the report is to contain a description of efforts made to encourage them to join and an assessment of why they have not.

Second, the Secretary is to include a description of the laws enacted by Parties to the OECD Convention to implement the OECD Convention, as well as an assessment of such laws and of their compatibility with the OECD Convention, including an assessment of how they may differ from the requirements of the OECD Convention.

Third, the report is to assess the enforcement measures taken by each Party to the OECD Convention during the previous year, including enforcement of domestic laws, promotion of public awareness of such laws, and the effectiveness, transparency, and viability of the OECD Convention's monitoring process. In particular, the Secretary is to assess the inclusion of input from the private sector and non-governmental organizations.

Fourth, the report should explain the domestic laws enacted by each Party to the OECD Convention that would prohibit the deduction of bribes in the computation of domestic taxes. The report should include a list of all nations which in any way permit the de-

duction of bribes and a description of any efforts in such nations to change such laws.

Fifth, the report will describe efforts to expand international participation in the OECD Convention through the addition of new signatories and by assuring that all countries that are or become members of the Organization for Economic Cooperation and Development are also Parties to the OECD Convention.

Sixth, the Secretary should assess the status of efforts to strengthen the OECD Convention by extending its prohibitions to cover bribery of political parties, party officials, and candidates for political office.

Seventh, the report is to in detail address advantages, in terms of market access, government ownership, government contacts or connections, privileges and immunities, favorable treatment by national regulatory authorities or tax treatment, or otherwise, in the countries or regions served by the organizations described in section 5, and the reasons for such advantages. The report should include individual reports for all nations unless substantially identical information can be applied to all nations within a region, in which case the report can include such region. The regional exception is designed to avoid creating an overly burdensome process with respect to nations which make little or no use of the system but is not a reason for failing to report on nations with significant or potentially significant traffic or potential or actual advantages such as those described above. The Committee intends that the Secretary of Commerce consult with the Federal Communications Commission in preparing this report. The Committee also intends that the Secretary of Commerce seek and incorporate comments from the private sector, including competing satellite companies and users of satellite services, in preparing this section of the report. The report should also include a detailed assessment of the progress toward fulfilling the policy described in section 5 of this Act, including an assessment of efforts made to achieve this policy.

Eighth, the report should assess the anti-bribery programs and transparency with respect to international public organizations covered by this legislation.

CHANGES IN EXISTING LAW MADE BY THE BILL, AS REPORTED

In compliance with clause 3 of rule XIII of the Rules of the House of Representatives, changes in existing law made by the bill, as reported, are shown as follows (existing law proposed to be omitted is enclosed in black brackets, new matter is printed in italic, existing law in which no change is proposed is shown in roman):

SECURITIES EXCHANGE ACT OF 1934

* * * * * * *

TITLE I—REGULATION OF SECURITIES EXCHANGES

* * * * * * *

PROHIBITED FOREIGN TRADE PRACTICES BY ISSUERS

SEC. 30A. (a) PROHIBITION.—It shall be unlawful for any issuer which has a class of securities registered pursuant to section 12 of

this title or which is required to file reports under section 15(d) of this title, or for any officer, director, employee, or agent of such issuer or any stockholder thereof acting on behalf of such issuer, to make use of the mails or any means or instrumentality of interstate commerce corruptly in furtherance of an offer, payment, promise to pay, or authorization of the payment of any money, or offer, gift, promise to give, or authorization of the giving of anything of value to—

(1) any foreign official for purposes of—

[(A)(i) influencing any act or decision of such foreign official in his official capacity, or (ii) inducing such foreign official to do or omit to do any act in violation of the lawful duty of such official, or]

(A)(i) influencing any act or decision of such foreign official in his official capacity, (ii) inducing such foreign official to do or omit to do any act in violation of the lawful duty of such official, or (iii) securing any improper advantage; or

* * * * * * *

(2) any foreign political party or official thereof or any candidate for foreign political office for purposes of—

[(A)(i) influencing any act or decision of such party, official, or candidate in its or his official capacity, or (ii) inducing such party, official, or candidate to do or omit to do an act in violation of the lawful duty of such party, official, or candidate,]

(A)(i) influencing any act or decision of such party, official, or candidate in its or his official capacity, (ii) inducing such party, official, or candidate to do or omit to do an act in violation of the lawful duty of such party, official, or candidate, or (iii) securing any improper advantage; or

* * * * * * *

(3) any person, while knowing that all or a portion of such money or thing of value will be offered, given, or promised, directly or indirectly, to any foreign official, to any foreign political party or official thereof, or to any candidate for foreign political office, for purposes of—

[(A)(i) influencing any act or decision of such foreign official, political party, party official, or candidate in his or its official capacity, or (ii) inducing such foreign official, political party, party official, or candidate to do or omit to do any act in violation of the lawful duty of such foreign official, political party, party official, or candidate, or]

(A)(i) influencing any act or decision of such foreign official, political party, party official, or candidate in his or its official capacity, (ii) inducing such foreign official, political party, party official, or candidate to do or omit to do any act in violation of the lawful duty of such foreign official, political party, party official, or candidate, or (iii) securing any improper advantage; or

* * * * * * *

(b) EXCEPTION FOR ROUTINE GOVERNMENTAL ACTION.—[Subsection (a)] *Subsections (a) and (g)* shall not apply to any facilitating or expediting payment to a foreign official, political party, or party official the purpose of which is to expedite or to secure the performance of a routine governmental action by a foreign official, political party, or party official.

(c) AFFIRMATIVE DEFENSES.—It shall be an affirmative defense to actions under [subsection (a)] *subsection (a) or (g)* that—

(1) * * *

* * * * * * *

(f) DEFINITIONS.—For purposes of this section:

[(1) The term "foreign official" means any officer or employee of a foreign government or any department, agency, or instrumentality thereof, or any person acting in an official capacity for or on behalf of any such government or department, agency, or instrumentality.]

(1)(A) The term "foreign official" means any officer or employee of a foreign government or any department, agency, or instrumentality thereof, or of a public international organization, or any person acting in an official capacity for or on behalf of any such government or department, agency, or instrumentality, or for or on behalf of any such public international organization.

(B) For purposes of subparagraph (A), the term "public international organization" means—

(i) an organization that is designated by Executive order pursuant to section 1 of the International Organizations Immunities Act (22 U.S.C. 288); or

(ii) any other international organization that is designated by the President by Executive order for the purposes of this section, effective as of the date of publication of such order in the Federal Register.

(g) ALTERNATIVE JURISDICTION.—

(1) It shall also be unlawful for any issuer organized under the laws of the United States, or a State, territory, possession, or commonwealth of the United States or a political subdivision thereof and which has a class of securities registered pursuant to section 12 of this title or which is required to file reports under section 15(d) of this title, or for any United States person that is an officer, director, employee, or agent of such issuer or a stockholder thereof acting on behalf of such issuer, to corruptly do any act outside the United States in furtherance of an offer, payment, promise to pay, or authorization of the payment of any money, or offer, gift, promise to give, or authorization of the giving of anything of value to any of the persons or entities set forth in paragraphs (1), (2), and (3) of subsection (a) of this section for the purposes set forth therein, irrespective of whether such issuer or such officer, director, employee, agent, or stockholder makes use of the mails or any means or instrumentality of interstate commerce in furtherance of such offer, gift, payment, promise, or authorization.

(2) As used in this subsection, the term "United States person" means a national of the United States (as defined in section 101 of the Immigration and Nationality Act (8 U.S.C.

1101)) or any corporation, partnership, association, joint-stock company, business trust, unincorporated organization, or sole proprietorship organized under the laws of the United States or any State, territory, possession, or commonwealth of the United States, or any political subdivision thereof.

* * * * * * *

PENALTIES

SEC. 32. (a) * * *

* * * * * * *

(c)(1)(A) Any issuer that violates [section 30A(a)] *subsection (a) or (g) of section 30A* shall be fined not more than $2,000,000.

(B) Any issuer that violates [section 30A(a)] *subsection (a) or (g) of section 30A* shall be subject to a civil penalty of not more than $10,000 imposed in an action brought by the Commission.

[(2)(A) Any officer or director of an issuer, or stockholder acting on behalf of such issuer, who willfully violates section 30A(a) shall be fined not more than $100,000, or imprisoned not more than five years, or both.

[(B) Any employee or agent of an issuer who is a United States citizen, national, or resident or is otherwise subject to the jurisdiction of the United States (other than an officer, director, or stockholder acting on behalf of such issuer), and who willfully violates section 30A(a), shall be fined not more than $100,000, or imprisoned not more than 5 years, or both.

[(C) Any officer, director, employee, or agent, of an issuer, or stockholder acting on behalf of such issuer, who violates section 30A(a) shall be subject to a civil penalty of not more than $10,000 imposed in an action brought by the Commission.]

(2)(A) Any officer, director, employee, or agent of an issuer, or stockholder acting on behalf of such issuer, who willfully violates subsection (a) or (g) of section 30A of this title shall be fined not more than $100,000, or imprisoned not more than 5 years, or both.

(B) Any officer, director, employee, or agent of an issuer, or stockholder acting on behalf of such issuer, who violates subsection (a) or (g) of section 30A of this title shall be subject to a civil penalty of not more than $10,000 imposed in an action brought by the Commission.

* * * * * * *

SECTION 104 OF THE FOREIGN CORRUPT PRACTICES ACT OF 1977

PROHIBITED FOREIGN TRADE PRACTICES BY DOMESTIC CONCERNS

SEC. 104. (a) PROHIBITION.—It shall be unlawful for any domestic concern, other than an issuer which is subject to section 30A of the Securities Exchange Act of 1934, or for any officer, director, employee, or agent of such domestic concern or any stockholder thereof acting on behalf of such domestic concern, to make use of the mails or any means or instrumentality of interstate commerce corruptly in furtherance of an offer, payment, promise to pay, or au-

thorization of the payment of any money, or offer, gift, promise to give, or authorization of the giving of anything of value to—

(1) any foreign official for purposes of—

[(A)(i) influencing any act or decision of such foreign official in his official capacity, or (ii) inducing such foreign official to do or omit to do any act in violation of the lawful duty of such official, or]

(A)(i) influencing any act or decision of such foreign official in his official capacity, (ii) inducing such foreign official to do or omit to do any act in violation of the lawful duty of such official, or (iii) securing any improper advantage; or

* * * * * * *

(2) any foreign political party or official thereof or any candidate for foreign political office for purposes of—

[(A)(i) influencing any act or decision of such party, official, or candidate in its or his official capacity, or (ii) inducing such party, official, or candidate to do or omit to do an act in violation of the lawful duty of such party, official, or candidate,]

(A)(i) influencing any act or decision of such party, official, or candidate in its or his official capacity, (ii) inducing such party, official, or candidate to do or omit to do an act in violation of the lawful duty of such party, official, or candidate, or (iii) securing any improper advantage; or

* * * * * * *

(3) any person, while knowing that all or a portion of such money or thing of value will be offered, given, or promised, directly or indirectly, to any foreign official, to any foreign political party or official thereof, or to any candidate for foreign political office, for purposes of—

[(A)(i) influencing any act or decision of such foreign official, political party, party official, or candidate in his or its official capacity, or (ii) inducing such foreign official, political party, party official, or candidate to do or omit to do any act in violation of the lawful duty of such foreign official, political party, party official, or candidate, or]

(A)(i) influencing any act or decision of such foreign official, political party, party official, or candidate in his or its official capacity, (ii) inducing such foreign official, political party, party official, or candidate to do or omit to do any act in violation of the lawful duty of such foreign official, political party, party official, or candidate, or (iii) securing any improper advantage; or

* * * * * * *

(b) EXCEPTION FOR ROUTINE GOVERNMENTAL ACTION.—[Subsection (a)] *Subsections (a) and (i)* shall not apply to any facilitating or expediting payment to a foreign official, political party, or party official the purpose of which is to expedite or to secure the performance of a routine governmental action by a foreign official, political party, or party official.

(c) AFFIRMATIVE DEFENSES.—It shall be an affirmative defense to actions under [subsection (a)] *subsection (a) or (i)* that—

(1) * * *

* * * * * * *

(d) INJUNCTIVE RELIEF.—(1) When it appears to the Attorney General that any domestic concern to which this section applies, or officer, director, employee, agent, or stockholder thereof, is engaged, or about to engage, in any act or practice constituting a violation of [subsection (a)] *subsection (a) or (i)* of this section, the Attorney General may, in his discretion, bring a civil action in an appropriate district court of the United States to enjoin such act or practice, and upon a proper showing, a permanent injunction or a temporary restraining order shall be granted without bond.

* * * * * * *

[(g) PENALTIES.—(1)(A) Any domestic concern that violates subsection (a) shall be fined not more than $2,000,000.

[(B) Any domestic concern that violates subsection (a) shall be subject to a civil penalty of not more than $10,000 imposed in an action brought by the Attorney General.

[(2)(A) Any officer or director of a domestic concern, or stockholder acting on behalf of such domestic concern, who willfully violates subsection (a) shall be fined not more than $100,000, or imprisoned not more than 5 years, or both.

[(B) Any employee or agent of a domestic concern who is a United States citizen, national, or resident or is otherwise subject to the jurisdiction of the United States (other than an officer, director, or stockholder acting on behalf of such domestic concern), and who willfully violates subsection (a), shall be fined not more than $100,000, or imprisoned not more than 5 years, or both.

[(C) Any officer, director, employee, or agent of a domestic concern, or stockholder acting on behalf of such domestic concern, who violates subsection (a) shall be subject to a civil penalty of not more than $10,000 imposed in an action brought by the Attorney General.]

(g) PENALTIES.—(1)(A) Any domestic concern that is not a natural person and that violates subsection (a) or (i) of this section shall be fined not more than $2,000,000.

(B) Any domestic concern that is not a natural person and that violates subsection (a) or (i) of this section shall be subject to a civil penalty of not more than $10,000 imposed in an action brought by the Attorney General.

(2)(A) Any natural person that is an officer, director, employee, or agent of a domestic concern, or stockholder acting on behalf of such domestic concern, who willfully violates subsection (a) or (i) of this section shall be fined not more than $100,000 or imprisoned not more than 5 years, or both.

(B) Any natural person that is an officer, director, employee, or agent of a domestic concern, or stockholder acting on behalf of such domestic concern, who violates subsection (a) or (i) of this section shall be subject to a civil penalty of not more than $10,000 imposed in an action brought by the Attorney General.

* * * * * * *

(h) DEFINITIONS.—For purposes of this section:

(1) * * *

[(2) The term "foreign official" means any officer or employee of a foreign government or any department, agency, or instrumentality thereof, or any person acting in an official capacity for or on behalf of any such government or department, agency, or instrumentality.]

(2)(A) The term "foreign official" means any officer or employee of a foreign government or any department, agency, or instrumentality thereof, or of a public international organization, or any person acting in an official capacity for or on behalf of any such government or department, agency, or instrumentality, or for or on behalf of any such public international organization.

(B) For purposes of subparagraph (A), the term "public international organization" means—

(i) an organization that is designated by Executive order pursuant to section 1 of the International Organizations Immunities Act (22 U.S.C. 288); or

(ii) any other international organization that is designated by the President by Executive order for the purposes of this section, effective as of the date of publication of such order in the Federal Register.

* * * * * * *

(4)(A) [For purposes of paragraph (1), the] *The* term "routine governmental action" means only an action which is ordinarily and commonly performed by a foreign official in—

(i) * * *

* * * * * * *

(i) ALTERNATIVE JURISDICTION.—

(1) It shall also be unlawful for any United States person to corruptly do any act outside the United States in furtherance of an offer, payment, promise to pay, or authorization of the payment of any money, or offer, gift, promise to give, or authorization of the giving of anything of value to any of the persons or entities set forth in paragraphs (1), (2), and (3) of subsection (a), for the purposes set forth therein, irrespective of whether such United States person makes use of the mails or any means or instrumentality of interstate commerce in furtherance of such offer, gift, payment, promise, or authorization.

(2) As used in this subsection, the term "United States person" means a national of the United States (as defined in section 101 of the Immigration and Nationality Act (8 U.S.C. 1101)) or any corporation, partnership, association, joint-stock company, business trust, unincorporated organization, or sole proprietorship organized under the laws of the United States or any State, territory, possession, or commonwealth of the United States, or any political subdivision thereof.

SEC. 104A. PROHIBITED FOREIGN TRADE PRACTICES BY PERSONS OTHER THAN ISSUERS OR DOMESTIC CONCERNS.

(a) PROHIBITION.—It shall be unlawful for any person other than an issuer that is subject to section 30A of the Securities Exchange Act of 1934 or a domestic concern (as defined in section 104 of this

Act), or for any officer, director, employee, or agent of such person or any stockholder thereof acting on behalf of such person, while in the territory of the United States, corruptly to make use of the mails or any means or instrumentality of interstate commerce or to do any other act in furtherance of an offer, payment, promise to pay, or authorization of the payment of any money, or offer, gift, promise to give, or authorization of the giving of anything of value to—

(1) any foreign official for purposes of—

(A)(i) influencing any act or decision of such foreign official in his official capacity, (ii) inducing such foreign official to do or omit to do any act in violation of the lawful duty of such official, or (iii) securing any improper advantage; or

(B) inducing such foreign official to use his influence with a foreign government or instrumentality thereof to affect or influence any act or decision of such government or instrumentality,

in order to assist such person in obtaining or retaining business for or with, or directing business to, any person;

(2) any foreign political party or official thereof or any candidate for foreign political office for purposes of—

(A)(i) influencing any act or decision of such party, official, or candidate in its or his official capacity, (ii) inducing such party, official, or candidate to do or omit to do an act in violation of the lawful duty of such party, official, or candidate, or (iii) securing any improper advantage; or

(B) inducing such party, official, or candidate to use its or his influence with a foreign government or instrumentality thereof to affect or influence any act or decision of such government or instrumentality,

in order to assist such person in obtaining or retaining business for or with, or directing business to, any person; or

(3) any person, while knowing that all or a portion of such money or thing of value will be offered, given, or promised, directly or indirectly, to any foreign official, to any foreign political party or official thereof, or to any candidate for foreign political office, for purposes of—

(A)(i) influencing any act or decision of such foreign official, political party, party official, or candidate in his or its official capacity, (ii) inducing such foreign official, political party, party official, or candidate to do or omit to do any act in violation of the lawful duty of such foreign official, political party, party official, or candidate, or (iii) securing any improper advantage; or

(B) inducing such foreign official, political party, party official, or candidate to use his or its influence with a foreign government or instrumentality thereof to affect or influence any act or decision of such government or instrumentality,

in order to assist such person in obtaining or retaining business for or with, or directing business to, any person.

(b) EXCEPTION FOR ROUTINE GOVERNMENTAL ACTION.—Subsection (a) of this section shall not apply to any facilitating or expediting payment to a foreign official, political party, or party official

the purpose of which is to expedite or to secure the performance of a routine governmental action by a foreign official, political party, or party official.

(c) AFFIRMATIVE DEFENSES.—It shall be an affirmative defense to actions under subsection (a) of this section that—

(1) the payment, gift, offer, or promise of anything of value that was made, was lawful under the written laws and regulations of the foreign official's, political party's, party official's, or candidate's country; or

(2) the payment, gift, offer, or promise of anything of value that was made, was a reasonable and bona fide expenditure, such as travel and lodging expenses, incurred by or on behalf of a foreign official, party, party official, or candidate and was directly related to—

(A) the promotion, demonstration, or explanation of products or services; or

(B) the execution or performance of a contract with a foreign government or agency thereof.

(d) INJUNCTIVE RELIEF.—

(1) When it appears to the Attorney General that any person to which this section applies, or officer, director, employee, agent, or stockholder thereof, is engaged, or about to engage, in any act or practice constituting a violation of subsection (a) of this section, the Attorney General may, in his discretion, bring a civil action in an appropriate district court of the United States to enjoin such act or practice, and upon a proper showing, a permanent injunction or a temporary restraining order shall be granted without bond.

(2) For the purpose of any civil investigation which, in the opinion of the Attorney General, is necessary and proper to enforce this section, the Attorney General or his designee are empowered to administer oaths and affirmations, subpoena witnesses, take evidence, and require the production of any books, papers, or other documents which the Attorney General deems relevant or material to such investigation. The attendance of witnesses and the production of documentary evidence may be required from any place in the United States, or any territory, possession, or commonwealth of the United States, at any designated place of hearing.

(3) In case of contumacy by, or refusal to obey a subpoena issued to, any person, the Attorney General may invoke the aid of any court of the United States within the jurisdiction of which such investigation or proceeding is carried on, or where such person resides or carries on business, in requiring the attendance and testimony of witnesses and the production of books, papers, or other documents. Any such court may issue an order requiring such person to appear before the Attorney General or his designee, there to produce records, if so ordered, or to give testimony touching the matter under investigation. Any failure to obey such order of the court may be punished by such court as a contempt thereof.

(4) All process in any such case may be served in the judicial district in which such person resides or may be found. The Attorney General may make such rules relating to civil investiga-

tions as may be necessary or appropriate to implement the provisions of this subsection.

(e) PENALTIES.—

(1)(A) Any juridical person that violates subsection (a) of this section shall be fined not more than $2,000,000.

(B) Any juridical person that violates subsection (a) of this section shall be subject to a civil penalty of not more than $10,000 imposed in an action brought by the Attorney General.

(2)(A) Any natural person who willfully violates subsection (a) of this section shall be fined not more than $100,000 or imprisoned not more than 5 years, or both.

(B) Any natural person who violates subsection (a) of this section shall be subject to a civil penalty of not more than $10,000 imposed in an action brought by the Attorney General.

(3) Whenever a fine is imposed under paragraph (2) upon any officer, director, employee, agent, or stockholder of a person, such fine may not be paid, directly or indirectly, by such person.

(f) DEFINITIONS.—For purposes of this section:

(1) The term "person", when referring to an offender, means any natural person other than a national of the United States (as defined in section 101 of the Immigration and Nationality Act (8 U.S.C. 1101) or any corporation, partnership, association, joint-stock company, business trust, unincorporated organization, or sole proprietorship organized under the law of a foreign nation or a political subdivision thereof.

(2)(A) The term "foreign official" means any officer or employee of a foreign government or any department, agency, or instrumentality thereof, or of a public international organization, or any person acting in an official capacity for or on behalf of any such government or department, agency, or instrumentality, or for or on behalf of any such public international organization.

(B) For purposes of subparagraph (A), the term "public international organization" means—

(i) an organization that is designated by Executive order pursuant to section 1 of the International Organizations Immunities Act (22 U.S.C. 288); or

(ii) any other international organization that is designated by the President by Executive order for the purposes of this section, effective as of the date of publication of such order in the Federal Register.

(3)(A) A person's state of mind is knowing, with respect to conduct, a circumstance or a result if—

(i) such person is aware that such person is engaging in such conduct, that such circumstance exists, or that such result is substantially certain to occur; or

(ii) such person has a firm belief that such circumstance exists or that such result is substantially certain to occur.

(B) When knowledge of the existence of a particular circumstance is required for an offense, such knowledge is established if a person is aware of a high probability of the existence of such circumstance, unless the person actually believes that such circumstance does not exist.

(4)(A) The term "routine governmental action" means only an action which is ordinarily and commonly performed by a foreign official in—

(i) obtaining permits, licenses, or other official documents to qualify a person to do business in a foreign country;

(ii) processing governmental papers, such as visas and work orders;

(iii) providing police protection, mail pick-up and delivery, or scheduling inspections associated with contract performance or inspections related to transit of goods across country;

(iv) providing phone service, power and water supply, loading and unloading cargo, or protecting perishable products or commodities from deterioration; or

(v) actions of a similar nature.

(B) The term "routine governmental action" does not include any decision by a foreign official whether, or on what terms, to award new business to or to continue business with a particular party, or any action taken by a foreign official involved in the decision-making process to encourage a decision to award new business to or continue business with a particular party.

(5) The term "interstate commerce" means trade, commerce, transportation, or communication among the several States, or between any foreign country and any State or between any State and any place or ship outside thereof, and such term includes the intrastate use of—

(A) a telephone or other interstate means of communication, or

(B) any other interstate instrumentality.

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